

Amy P. Lally (SBN 198555)
alally@sidley.com
Ellyce R. Cooper (SBN 204453)
ecooper@sidley.com
SIDLEY AUSTIN LLP
1999 Avenue of the Stars, 17th Floor
Los Angeles, CA 90067
Telephone: +1 310 595-9500
Facsimile: +1 310 595-9501

Mark Rosenbaum (SBN 59940)
mrosenbaum@publiccounsel.org
Judy London (SBN 149431)
jlondon@publiccounsel.org
Talia Inlender (SBN 253796)
tinlender@publiccounsel.org
Alisa Hartz (SBN 285141)
ahartz@publiccounsel.org
Lucero Chavez (SBN 273531)
lchavez@publiccounsel.org
Elizabeth Hadaway (SBN 308800)
ehadaway@publiccounsel.org
Malhar Shah (SBN 318588)
mshah@publiccounsel.org
Deena Tumeh (SBN 318573)
dtumeh@publiccounsel.org
PUBLIC COUNSEL
610 S. Ardmore Avenue
Los Angeles, CA 90005
Telephone: +1 213 385-2977
Facsimile: +1 213 385-9089

Attorneys for Plaintiffs
Additional Counsel on next page

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MS. J.P., MS. J.O., AND MS. R.M., on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III,
ATTORNEY GENERAL OF THE

Case No. 2:18-cv-06081

**NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

1 UNITED STATES; KIRSTJEN
2 NIELSEN, SECRETARY OF
3 HOMELAND SECURITY; U.S.
4 DEPARTMENT OF HOMELAND
5 SECURITY, AND ITS SUBORDINATE
6 ENTITIES; U.S. IMMIGRATION AND
7 CUSTOMS ENFORCEMENT; U.S.
8 CUSTOMS AND BORDER
9 PROTECTION; ALEX M. AZAR II,
10 SECRETARY OF HEALTH AND
11 HUMAN SERVICES; U.S.
12 DEPARTMENT OF HEALTH AND
13 HUMAN SERVICES; SCOTT LLOYD,
14 DIRECTOR OF THE OFFICE OF
15 REFUGEE RESETTLEMENT; OFFICE
16 OF REFUGEE RESETTLEMENT;
17 DAVID MARIN, LOS ANGELES FIELD
18 OFFICE DIRECTOR, U.S.
19 IMMIGRATION AND CUSTOMS
20 ENFORCEMENT; LISA VON
21 NORDHEIM, WARDEN, JAMES A.
22 MUSICK FACILITY; MARC J. MOORE,
23 SEATTLE FIELD OFFICE DIRECTOR,
24 U.S. IMMIGRATION AND CUSTOMS
25 ENFORCEMENT; LOWELL CLARK,
26 WARDEN, TACOMA NORTHWEST
27 DETENTION CENTER,
28

Defendants.

Date: October 29, 2018

Time: 8:30 a.m.

Judge: Hon. John A. Kronstadt

Courtroom: 10B

Carter G. Phillips*
cphillips@sidley.com
Jennifer J. Clark*
jennifer.clark@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: +1 202 736-8000
Facsimile: +1 202 736-8711

Michael Andolina*
mandolina@sidley.com
Timothy Payne*
tpayne@sidley.com
Kevin Fee*
kfee@sidley.com
SIDLEY AUSTIN LLP

Mark E. Haddad (SBN 205945)
markhadd@usc.edu
Part-time Lecturer in Law
USC Gould School of Law**
University of Southern California
699 Exposition Blvd.
Los Angeles, CA 90089
Telephone: +1 213 675-5957

Luis Cortes Romero (SBN 310852)
lcortes@ia-lc.com
Alma L. David (SBN 257676)
adavid@ia-lc.com
IMMIGRANT ADVOCACY &
LITIGATION CENTER, PLLC
19309 68th Avenue South, Suite R-102

1 One South Dearborn
2 Chicago, IL 60603
3 Telephone: +1 312 853-7000
4 Facsimile: +1 312 853-7036

Kent, WA 98032
Telephone: +1 253 872-4730
Facsimile: +1 253 237-1591

5 Sean A. Commons (SBN 217603)
6 scommons@sidley.com
7 Bridget S. Johnsen (SBN 210778)
8 bjohnsen@sidley.com
9 SIDLEY AUSTIN LLP
10 555 West Fifth Street
11 Los Angeles, CA 90013
12 Telephone: +1 213 896-6000
13 Facsimile: +1 213 896-6600

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
**Application for admission pro hac vice to be submitted*

*** Institution listed for identification purposes only*

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 29, 2018, at 8:30 a.m. or as soon thereafter as may be heard in Courtroom 10B of the above-entitled court, located at 350 West 1st Street, Los Angeles, California 90012, plaintiffs Ms. J.P., Ms. J.O., and Ms. R.M., (collectively “Plaintiffs”) will and hereby do move this Court for entry of a preliminary injunction requiring Defendants to provide meaningful access to mental health care screening and treatment to Plaintiffs and members of the proposed class. Plaintiffs seek, in particular, meaningful access to:

- mental health screening for all Plaintiffs and class members to identify those who require further treatment as a result of the trauma inflicted on them, which must be performed by persons trained to recognize the signs and symptoms of such trauma, within fourteen (14) days of the entry of the Court’s injunction;
- subsequent mental health screening for all Plaintiffs and class members to identify those who require further treatment as a result of the trauma inflicted on them, which must be performed by persons trained to recognize the signs and symptoms of such trauma, within fourteen (14) days of the reunification of the Plaintiff or class member with his/her child(ren) if such reunification takes place after the screening ordered as referenced above;
- mental health care treatment, for those Plaintiffs and class members whose screenings indicate that such treatment is needed, which must:
 - be provided in a safe environment that will not reinforce trauma;
 - be provided on a family basis to all members of the reunified family together;
 - be provided in a culturally competent manner by mental health clinicians trained in evidence-based trauma-informed interventions; and
 - be provided for a period of time sufficient to treat the trauma inflicted; and
- such other relief as is permitted by law.

This motion is made pursuant to Federal Rule of Civil Procedure 65 on the grounds that 1) Plaintiffs and class members are likely to prevail on their substantive due process claim under the Fifth Amendment and obtain an order directing the government to provide them with effective mental health screening and treatment, 2) Plaintiffs and class members will likely suffer irreparable harm absent preliminary

1 relief, 3) the balance of equities favors entry of an injunction, and 4) an injunction is
2 in the public interest.

3 This motion is based upon this Notice of Motion; the supporting Memorandum
4 of Points and Authorities; the supporting declarations; all documents and pleadings on
5 file in this action; and on such other oral and documentary evidence as may be
6 presented at the hearing on this motion.

7
8 DATED: July 18, 2018

9
10 /s/ Amy P. Lally
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND 2

A. Plaintiffs and the Proposed Class. 2

B. The Government Implemented the Family Separation Policy. 2

C. The Government’s Family Separation Policy Is Found Likely
 Unconstitutional and Enjoined 3

D. The Government’s Family Separation Policy Inflicts Trauma and
 Increased Risk of Lifelong Health Problems on Plaintiffs, Class
 Members, and Their Children. 5

E. Plaintiffs, Class Members, and Their Children Require Trauma-
 Informed Family Mental Health Screenings and Services to
 Recover From the Trauma Inflicted by the Government10

F. Mental Health Care Services Provided by the Government Are Not
 Effective Or Sufficient.12

LEGAL STANDARD.....13

ARGUMENT.....14

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.14

A. The Government’s Detention of Class Members Created a Special
 Relationship Requiring It to Provide Effective Mental Health
 Treatment During and Following Detention.....14

B. The Government Must Provide Effective Mental Health Care to
 Plaintiffs and Class Members to Remedy the Injury That It Caused
 16

C. The Government Has Failed To Provide Adequate Mental Health
 Screenings and Treatment21

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE
 INJUNCTION IS NOT GRANTED21

III. THE BALANCE OF HARDSHIPS FAVORS THE INJUNCTION23

IV. THE PUBLIC INTEREST FAVORS THE INJUNCTION24

CONCLUSION25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases	Page(s)
<i>All. for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011).....	13
<i>Cook v. California</i> , No. 1:16-CV-00674-LJO-SAB, 2016 WL 4161114 (E.D. Cal. Aug. 5, 2016)	16
<i>Cty. of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	17, 18
<i>DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.</i> , 489 U.S. 189 (1989).....	14
<i>Doe v. Kelly</i> , 878 F.3d 710 (9th Cir. 2017).....	3, 14
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).....	14
<i>Garcia v. Google, Inc.</i> , 786 F.3d 733 (9th Cir. 2015) (en banc)	13
<i>Gibson v. Cty. of Washoe</i> , 290 F.3d 1175 (9th Cir. 2002), <i>overruled on other grounds by Castro</i> <i>v. Cty. of Los Angeles</i> , 833 F.3d 1060 (9th Cir. 2016) (en banc)	14, 15, 21
<i>Estate of Gonzales v. Hickman</i> , No. ED CV 05-00660 MMM, 2006 WL 4959780 (C.D. Cal. Jan. 30, 2006)	16
<i>Gordon v. Cty. of Orange</i> , 888 F.3d 1118 (9th Cir. 2018).....	20
<i>Halet v. Wend Inv. Co.</i> , 672 F.2d 1305 (9th Cir. 1982).....	19
<i>Haskins v. Stanton</i> , 794 F.2d 1273 (7th Cir. 1986).....	24

1 *Henry A. v. Willden*,
2 678 F.3d 991 (9th Cir. 2012)..... 14, 17, 18, 19

3 *Hernandez v. Sessions*,
4 872 F.3d 976 (9th Cir. 2017)..... 22, 23, 24

5 *Kennedy v. City of Ridgefield*,
6 439 F.3d 1055 (9th Cir. 2006)..... 14, 16

7 *Leiva-Perez v. Holder*,
8 640 F.3d 962 (9th Cir. 2011)..... 19

9 *M.R. v. Dreyfus*,
10 697 F.3d 706 (9th Cir. 2012)..... 24

11 *Melendres v. Arpaio*,
12 695 F.3d 990 (9th Cir. 2012)..... 24

13 *Ms. L. v. U.S. Immigration & Customs Enf't*,
14 Case No. 3:18-cv-00428-DMS-MDD (S.D. Cal.) 4, 5, 13, 18

15 *Norsworthy v. Beard*,
16 87 F. Supp. 3d 1164 (N.D. Cal. 2015)..... 25

17 *Patel v. Kent Sch. Dist.*,
18 648 F.3d 965 (9th Cir. 2011)..... 19

19 *Penilla v. City of Huntington Park*,
20 115 F.3d 707 (9th Cir. 1997) (*per curiam*) 16

21 *Pimentel v. Dreyfus*,
22 670 F.3d 1096 (9th Cir. 2012)..... 13

23 *Porter v. Osborn*,
24 546 F.3d 1131 (9th Cir. 2008)..... 17

25 *Rodriguez v. Robbins*,
26 715 F.3d 1127 (9th Cir. 2013)..... 23

27 *Sierra Forest Legacy v. Rey*,
28 577 F.3d 1015 (9th Cir. 2009)..... 13

United States v. Raines,
362 U.S. 17 (1960)..... 24

1 *Wakefield v. Thompson,*
2 177 F. 3d 1160 (9th Cir. 1999)..... 14, 15, 16

3 **Constitutional Provisions**

4 Fifth Amendment.....14

5 Eighth Amendment.....15

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

INTRODUCTION

Every parent who has lost sight of a child for even a short time knows that family separation may cause severe stress to parent and child alike. They also know that separation can become traumatic where it is forcible, sudden, or prolonged, and where loved ones cannot contact one another while separated. Yet the government, including Defendants, deliberately, needlessly, and unconstitutionally separated thousands of children from their parents, refused to allow parents and children to communicate, failed to provide information about the well-being of separated family members, and kept separated family members in intolerable suspense by refusing to explain when or even *if* families would *ever* be reunified.

Even if the government somehow failed fully to anticipate the trauma that its actions would cause, the reactions of the separated family members immediately informed the government that it was inflicting severe harm. Media reports and personal accounts of the separations are replete with vivid descriptions of obviously terrified children and desperate parents. Compl., Dkt. No. 1 (“Compl.”) ¶¶ 107, 130, 132-33. The experience of the putative class representatives in this case and their families likewise shows the obvious nature of the harm inflicted by the government. Plaintiff Ms. J.P.’s daughter fainted in terror when she realized she was about to be separated from her mother, and after nearly two months of separation feels depressed and cannot speak about her mother without crying. *Id.* ¶¶ 19, 21. Plaintiff Ms. O’s and Ms. M’s daughters have suffered excessive worry, dysphoric mood, crying spells, sleep and appetite disturbances, and fear of the unknown. *Id.* ¶ 145.

The government’s misconduct inflicted devastating psychological trauma on both parents and children the government chose to tear apart. This trauma is being multiplied each day that these families remain separated and its effects will not evaporate once families are reunited; instead, it risks causing long-lasting damage to the physical and mental health of parents and children alike, including anxiety, depression, and post-traumatic stress disorder (“PTSD”). Plaintiffs, and the group of

1 parents whom they seek to represent in this action, need immediate mental health
 2 screenings, and if appropriate, family mental health treatment designed to alleviate
 3 such trauma to reduce the risk of such long-term consequences to both parent and
 4 child.

5 The government has compounded the harm caused by its callous and
 6 unconstitutional family separation program by failing to provide adequate mental
 7 health care. This failure violates the government's constitutional obligations in two
 8 independent ways. First, the government must provide adequate health care, including
 9 mental health care, to persons it detains. Second, having inflicted grievous harm on
 10 thousands of people by its misconduct, which has already been found likely to violate
 11 due process, the government is promptly required to remedy the damage it has caused
 12 and prevent further damage by providing effective trauma-focused family therapy.
 13 This motion seeks an order from the Court requiring the government to live up to its
 14 constitutional obligations by providing effective treatment in an appropriate setting to
 15 address the harm inflicted by its unconstitutional family separation policy.

16 **FACTUAL BACKGROUND**

17 **A. Plaintiffs and the Proposed Class.**

18 Plaintiffs in this case are three mothers who were separated from their minor
 19 children under the government's family separation policy.¹ They seek to represent the
 20 following nationwide class:

21 All adult parents nationwide who (1) were, are, or will be detained in
 22 immigration custody by the Department of Homeland Security, (2) have
 23 a minor child who has been, is, or will be separated from them by DHS
 24 and detained in DHS or ORR [Office of Refugee Resettlement] custody
 or foster care, absent a demonstration in a hearing that the parent is unfit
 or presents a danger to the child.

25 **B. The Government Implemented the Family Separation Policy.**

26 On May 7, 2018, Defendant Attorney General Jeff Sessions announced a "zero-
 27 tolerance" policy of forced family separation to deter migrants from crossing the

28 ¹ Compl. ¶ 4.

southern border, announcing “If you cross this border unlawfully, then we will prosecute you. It’s that simple. . . . If you are smuggling a child, then we will prosecute you and that child will be separated from you. . . .”² But the policy was not limited to “smugglers.” Rather, ordinary immigrant families – many of whom are seeking asylum – bore its brunt. In the first month of the policy, nearly 3,000 children were separated from their parents while crossing the border.³ Some children were as young as 18 months old, and more than 100 were younger than four years old.⁴

The government mischaracterized family separation as necessary to enforce the law. But DHS expressly contemplated using family separation to deter migration from Central America into the United States at least a year before the “zero tolerance” policy was adopted.⁵ In March 2017, then-DHS Secretary Kelly confirmed that family separation was under consideration as a means to deter migration across the southern border. On May 11, 2018, White House Chief of Staff John Kelly confirmed that the family separation policy was put in place to deter other migrants, specifically Central Americans, from coming to the United States. In his words, “a big name of the game is deterrence.”⁶

C. The Government’s Family Separation Policy Is Found Likely Unconstitutional and Enjoined.

The government’s policy of separating families was met with widespread

² *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, DOJ Justice News (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

³ Caitlin Dickerson, *Trump Administration in Chaotic Scramble to Reunify Migrant Families*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/migrant-children-chaos-family-separation.html>.

⁴ Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

⁵ Daniella Diaz, *Kelly: DHS is considering separating undocumented children from their parents at the border*, CNN (March 6, 2017), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>.

⁶ *Transcript: White House Chief of Staff John Kelly’s Interview with NPR* NPR (May 11 2018) <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> (last visited July 12, 2018).

1 condemnation and, unsurprisingly, litigation. One of the cases challenging the policy
 2 was filed by a refugee known as “Ms. L.” in the Southern District of California, and is
 3 pending before Judge Dana Sabraw. *Ms. L. v. U.S. Immigration & Customs Enf’t*,
 4 Case No. 3:18-cv-00428-DMS-MDD (S.D. Cal.) (“Ms. L. Case”). On June 26, 2018,
 5 Judge Sabraw preliminarily certified a class of parents who enter the United States
 6 who were, are or will be detained in immigration custody, and who have a minor child
 7 who is or will be separated from them absent a determination that the parent is unfit or
 8 endangers the child. *Ms. L. Case*, Dkt. No. 82 at 17. That same day, he entered a
 9 preliminary injunction that included the following provisions, among others:

- 10 • Defendants . . . are preliminarily enjoined from detaining Class Members in
 11 DHS custody without and apart from their minor children, absent a
 12 determination that the parent is unfit or presents a danger to the child
- 13 • Defendants must reunify all Class Members with their minor children who are
 14 under the age of five (5) within fourteen (14) days of the entry of this Order;
 15 and . . . Defendants must reunify all Class Members with their minor children
 16 age five (5) and over within thirty (30) days of the entry of this Order.
- 17 • Defendants . . . are preliminarily enjoined from removing any Class Members
 18 without their child

19 *Ms. L. Case*, Dkt. No. 83 at 22-24.

20 In support of this injunction, Judge Sabraw found that the *Ms. L. Case* plaintiffs
 21 had submitted evidence demonstrating that they were likely to succeed in showing that
 22 the government’s family separation practice violates due process and “shocks the
 23 conscience.” *Id.* at 12. Judge Sabraw found that the government implemented this
 24 practice “without any effective system or procedure for (1) tracking the children after
 25 they were separated from their parents, (2) enabling communication between the
 26 parents and their children after separation, and (3) reuniting the parents and children
 27 after the parents are returned to immigration custody following completion of their
 28 criminal sentence.” *Id.* at 14. Noting that the government routinely catalogs, stores,

1 and returns *property* seized from detainees upon their release, Judge Sabraw found
 2 that the government's failure to do the same with respect to *children* "cannot satisfy
 3 the requirements of due process." *Id.* at 14-15. Going further, Judge Sabraw found
 4 that the government improperly placed the onus on parents to "search for their
 5 children and make application for reunification;" he found that placing that burden on
 6 parents "is backwards" because "the Government has an affirmative obligation to
 7 track and promptly reunify these family members." *Id.* at 16-17. In summary, Judge
 8 Sabraw found that the government's practice of separating families, as implemented,
 9 "is likely to be so egregious, so outrageous, that it may fairly be said to shock the
 10 contemporary conscience . . . interferes with rights implicit in the concept of ordered
 11 liberty, . . . and is so brutal and offensive that it [does] not comport with traditional
 12 ideas of fair play and decency." *Id.* at 17 (citations and quotation marks omitted).

13 Judge Sabraw also found that the plaintiffs were likely to suffer irreparable
 14 harm because they were likely deprived of their constitutional rights. *Id.* Judge
 15 Sabraw further found that the balance of equities and public interest favored the
 16 plaintiffs, because they had established a likelihood that the government's policy was
 17 unconstitutional, because the injunction would not interfere with the government's
 18 ability to enforce criminal and immigration laws, and to exercise discretion in matters
 19 of release and detention consistent with law, and because the injunction would protect
 20 the interest of parents in the care, custody, and control of their children, which is
 21 perhaps the oldest of the fundamental liberty interests recognized by the Supreme
 22 Court. *Id.* at 20-21 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

23 **D. The Government's Family Separation Policy Inflicts Trauma and**
 24 **Increased Risk of Lifelong Health Problems on Plaintiffs, Class**
Members, and Their Children.

25 The government's policy of separating families has caused harm to separated
 26 families. The consensus among trauma experts is that tearing children from their
 27 parents inflicts severe complex trauma on parents and children alike. As Senior Vice
 28 Dean and Professor of Mental Health at University of Southern California Dr.

1 Marleen Wong explains, trauma is the body's neurobiological stress response to
 2 experiencing or witnessing an event involving life-threatening circumstances or threat
 3 of serious injury that causes him or her to feel intense fear, helplessness, or horror.⁷
 4 Complex trauma describes multiple, repeated, persistent, or prolonged exposure to
 5 trauma such that the body's stress response impacts the development and functioning
 6 of the brain.⁸ Left untreated, such trauma causes immediate and long-lasting physical
 7 and psychological harm, especially in children, whose developing bodies and brains
 8 are ill equipped to cope with traumatic stress.⁹

9 Upon separation, children experience acute psychological distress. According
 10 to Founder and Chief Executive Officer of Seneca Family of Agencies Kenneth
 11 Berrick, founder of the Center for Family Finding and Youth Connectedness Kevin
 12 Campbell, and Clinical Director of Seneca Family of Agencies Dr. John Sprinson,
 13 such trauma may be particularly severe when the separation is sudden or forcible.¹⁰
 14 During the moment of separation, a child can experience "severe neurobiological
 15 stress causing the child to feel intense fear, helplessness, or horror."¹¹ "Immediate
 16 reactions include obvious emotional suffering in the form of inconsolable crying,
 17 desperate efforts to pursue or search for the parent and anger."¹² Instructor of
 18 Psychiatry at the Harvard Medical School and Massachusetts General Hospital Dr.
 19 Jose Hidalgo notes these effects may be exacerbated by the additional trauma caused

21 ⁷ Declaration of Marleen Wong, Dkt. No. 1-16 ("Wong Decl.") ¶ 12. Each
 22 Declaration cited herein also was attached to the Complaint. Plaintiffs have
 23 referenced the document number for those attachments to the Complaint as well as
 refiled the Declarations relied upon in this Motion per L.R. 7.5(b).

⁸ *Id.*

⁹ Declaration of Kenneth Berrick, et al., Dkt. No. 1-2 ("Berrick Decl.") ¶ 15;
 24 Declaration of Dylan Gee, Dkt. No. 1-13 ("Gee Decl.") ¶¶ 5, 8, 9; Declaration of Jose
 25 Hidalgo, Dkt. No. 1-14 ("Hidalgo Decl.") ¶ 13; Declaration of Bruce D. Perry, Dkt.
 26 No. 1-15 ("Perry Decl.") ¶ 21; Wong Decl. ¶ 24 ("Prolonged exposure to such stress
 has a debilitating effect on children even after the particular traumatic event is over.")

¹⁰ Berrick Decl. ¶ 9 ("When the separation is sudden, unpredictable, or in a strange
 27 environment with no other familiar adult figures present then the response is likely to
 be extreme."); Hidalgo Decl. ¶¶ 9, 13; Wong Decl. ¶¶ 19, 23.

¹¹ Wong Decl. ¶ 23.

¹² Berrick Decl. ¶ 10.

1 when witnessing a parent's reaction to separation.¹³

2 In the immediate aftermath of separation, children are likely to continue to
3 suffer from "extraordinary stress and pain."¹⁴ They may show signs of regression,
4 reverting to crying and bed-wetting, or suffer the loss of other important
5 developmental milestones.¹⁵ Separated children are also likely to exhibit a variety of
6 negative behaviors from aggressiveness to withdrawal.¹⁶

7 The longer the parent and child are separated, the greater the harm the child will
8 experience.¹⁷ Decades of public health research demonstrate that the child-parent
9 bond is a crucial factor in healthy child development.¹⁸ The absence of interaction
10 between parent and child "acts as a 'double whammy' for healthy development: not
11 only does the brain not receive the positive stimulation it needs, but the body's stress
12 response is activated, flooding the developing brain with potentially harmful stress
13 hormones."¹⁹ Moreover, separation disrupts and severely damages the relationship

14
15 ¹³ Hidalgo Decl. ¶ 9.

16 ¹⁴ Declaration of Luis H. Zayas, Dkt. No. 1-17 ("Zavas Decl.") ¶ 11; *see also* Gee
17 Decl. ¶ 5 ("The immediate psychological consequences of exposure to traumatic
18 events involving caregivers include, but are not limited to, anxiety, distress, despair,
19 and terror for both the child and the parent."); Perry Decl. ¶ 21; Wong Decl. ¶ 20.

20 ¹⁵ Sady Doyle, *Child Trauma Can't Be Undone With an Executive Order*, ELLE
21 MAGAZINE (June 21, 2018), [https://www.elle.com/culture/career-](https://www.elle.com/culture/career-politics/a21748590/child-trauma-cant-be-undone-with-an-executive-order/)
22 [politics/a21748590/child-trauma-cant-be-undone-with-an-executive-order/](https://www.elle.com/culture/career-politics/a21748590/child-trauma-cant-be-undone-with-an-executive-order/) (last
23 visited July 12, 2018); *see also* Berrick Decl. ¶ 10.

24 ¹⁶ Berrick Decl. ¶ 10; Wong Decl. ¶¶ 18, 20.

25 ¹⁷ Hidalgo Decl. ¶ 12; Jessica Henderson Daniel, PhD, *Statement of APA President*
26 *Regarding Executive Order Rescinding Immigrant Family Separation Policy*, AM.
27 PSYCHOLOGICAL ASS'N (June 20, 2018),
28 <http://www.apa.org/news/press/releases/2018/06/family-separation-policy.aspx> (last
visited July 12, 2018).

¹⁸ Karen Dineed Wagner, MD, PhD, *President's Statement on Separating Children*
23 *From Families*, AMER. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY (May 11,
24 2018), [https://www.aacap.org/App_Themes/AACAP/Docs/press/2018/Statement-on-](https://www.aacap.org/App_Themes/AACAP/Docs/press/2018/Statement-on-Separating-Children-and-Families.pdf)
25 [Separating-Children-and-Families.pdf](https://www.aacap.org/App_Themes/AACAP/Docs/press/2018/Statement-on-Separating-Children-and-Families.pdf) (last visited July 12, 2018) ("Parental support is
26 an essential and proven protective factor that substantially reduces risk for adverse
27 health and developmental outcomes for children."); *Separating Parents and Children*
28 *at US Border is Inhumane and Sets the Stage for a Public Health Crisis*, AM. PUBLIC
HEALTH ASS'N (June 15, 2018), [https://www.apha.org/news-and-media/news-](https://www.apha.org/news-and-media/news-releases/apha-news-releases/2018/parent-child-separation)
[releases/apha-news-releases/2018/parent-child-separation](https://www.apha.org/news-and-media/news-releases/apha-news-releases/2018/parent-child-separation) (last visited July 12, 2018).

¹⁹ *Serve and Return*, HARVARD UNIVERSITY CENTER ON THE DEVELOPING CHILD,
<https://developingchild.harvard.edu/science/key-concepts/serve-and-return/> (last
visited July 11, 2018); *see also* Berrick Decl. ¶ 14

1 between a child and their parent.²⁰

2 Assistant Professor of Psychology at Yale University Dr. Dylan Gee writes,
3 “[f]or a child who has been separated from their parent at the border, their body and
4 brain are being shaped to anticipate danger and prepare for the worst.”²¹ As detailed
5 by substantial research conducted by Adjunct Professor in the Department of
6 Psychiatry and Behavioral Sciences at the Feinberg School of Medicine at
7 Northwestern University, Dr. Bruce Perry, stress hormones induce a state of
8 hypervigilance that alters a child’s cognition and emotion and causes chronic
9 problems with how that child responds to stress over a lifetime.²² Such alterations
10 increase the risk of “psychological and physical health problems,” including
11 “fundamental changes in brain function,” which may “manifest[] as a loss of capacity
12 to regulate intense emotions, to cope with future stress and to regulate fear reactions to
13 reminders of traumatic events,” and may cause “other effects such as depression,
14 substance abuse, problems forming relationships, and other behavioral problems.”²³

15 Parents experience psychological trauma due to forcible separation from their
16 children.²⁴ In adults, such trauma “is associated with elevated risk for psychiatric

17 ²⁰ Berrick Decl. ¶¶ 10, 11.

18 ²¹ Dylan Gee, *I study kids who were separated from their parents. The trauma could*
19 *change their brains forever*, VOX (June 20, 2018), [https://www.vox.com/first-](https://www.vox.com/first-person/2018/6/20/17482698/tender-age-family-separation-border-immigrants-children)
20 [person/2018/6/20/17482698/tender-age-family-separation-border-immigrants-children](https://www.vox.com/first-person/2018/6/20/17482698/tender-age-family-separation-border-immigrants-children)
(last visited July 12, 2018).

21 ²² *Id.*; see also Perry Decl. ¶¶ 4, 13 (“[T]rauma, neglect, and maltreatment during
22 childhood have profound effects on physical, social, emotional, behavioral, and
23 cognitive development.”); ¶ 21 (“[T]raumatic stress alters the developing brain. It can
24 increase risk for a host of emotional and behavioral problems, including antisocial
25 behavior, attention problems, acting out, aggressive or violent behaviors, lack of trust,
26 and other counterproductive coping mechanisms.”); Berrick Decl. ¶¶ 12, 16; Gee
27 Decl. ¶¶ 5, 8.

28 ²³ Hidalgo Decl. ¶ 13; Gee, *supra* n.21 (“A child whose brain is constantly scanning
the environment for danger will undoubtedly have difficulty paying attention in class
or interacting with peers on the playground. . . . In the long run, the cascade of
consequences places individuals who have experienced early trauma at risk for
academic or occupational failure, substance abuse, and health problems such as heart
disease and diabetes.”); Doyle, *supra* n. 15 (“‘Long-term, these individuals who have
traumatic reactions are at heightened risk of virtually every medical problem,’ says
Dr. Judith Cohen, Medical Director of the Center for Traumatic Stress. ‘Neurologic to
cardiac to pulmonary to reproductive problems . . . just go down the body and
virtually every part is affected.’”).

²⁴ Hidalgo Decl. ¶ 14; Gee Decl. ¶ 6.

disorders including [PTSD] and can induce physiological changes, including but not limited to dysregulated stress responding, amygdala hyperactivity, and deficits in prefrontal cortex control of the amygdala, which are associated with difficulty regulating fear.”²⁵ The trauma may also manifest in physical and mental symptoms of anxiety, depression, suicidal ideation, loss of appetite, and loss of sleep.²⁶

PTSD can escalate into more severe mental health and social problems, including (i) intrusive recollections of the traumatic event, (ii) dissociative states lasting several days in which persons feel detached from their bodies or the world around them, (iii) auditory pseudo-hallucinations and paranoid ideation, (iv) an increased likelihood of engaging in aggressive, reckless, or self-destructive behavior, and (v) an increased risk of suicidal ideation and suicide attempts.²⁷ PTSD has functional consequences, including high levels of social, occupational, and physical disability, high levels of medical utilization, and impaired functioning across social, interpersonal, educational, physical, health, and occupational domains.²⁸

Plaintiffs and class members here have already suffered such trauma and consequent injury. Plaintiff Ms. P. “is displaying symptoms of [PTSD] . . . as a result of her separation from her daughter” and is also “displaying symptoms of both depression and anxiety.”²⁹ If left untreated, these symptoms “could escalate into a diagnosis of PTSD, Dissociative Disorder, and Major Depressive Disorder.”³⁰ There have also been credible reports that a parent forcibly separated from his child under the zero-tolerance policy was driven to suicide.³¹ According to press reports, Marco

²⁵ Gee Decl. ¶ 6 (citations omitted).

²⁶ Berrick Decl. ¶ 19.

²⁷ Declaration of Alejandra Acuna, Dkt. No. 1-4 (“Acuna Decl.”) ¶ 11.

²⁸ *Id.*

²⁹ Acuna Decl. ¶¶ 7-8.

³⁰ *Id.* ¶ 11.

³¹ See Nick Miroff, *A Family Was Separated At the Border, and This Distraught Father Took His Own Life*, WASH. POST (June 9, 2018), https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html?utm_term=.f3c12fb7157d (last visited July 12, 2018).

1 Antonio Muñoz and his family were taken into custody and sought asylum. His child
 2 was forcibly taken from his arms, and then Mr. Muñoz was placed in a cell. After he
 3 struggled to break free of his cage, the Border Patrol transported him to a local jail and
 4 placed him in a padded cell. The next morning, he was found dead apparently as a
 5 suicide.

6 **E. Plaintiffs, Class Members, and Their Children Require Trauma-**
 7 **Informed Family Mental Health Screenings and Services to Recover**
 8 **From the Trauma Inflicted by the Government.**

9 If the separated families are to recover from the trauma caused by the
 10 government's separation, they require mental health screening and services that meet
 11 several criteria. Most importantly, the treatment must be evidence-based and trauma-
 12 informed, meaning that it must be designed especially to alleviate the psychological
 13 and neurobiological consequences of forcible separation.³² Such treatments exist and
 14 have been shown to be effective across cultural backgrounds.³³ Some have been
 15 successfully adapted for immigrant populations.³⁴ These mental-health services often
 16 take the form of trauma-focused cognitive behavioral therapy.³⁵

17 For these services to be effective, several conditions must be met. First, **the**
 18 **families must be reunified** quickly. The longer the separation, the more pervasive
 19 and intense the trauma becomes.³⁶ "The effects of trauma on separated children are
 20 [already] significant, long-lasting, and difficult to mitigate."³⁷ Prolonging the
 21 separation increases the trauma and thus requires more intense mental-health services.

22 Second, all reunited parents and children **must be immediately screened** "to
 23 identify those whose anxiety is toxic and detrimental to themselves and their families,
 24 as well as those whose anxiety has grown into trauma with its accompanying
 25

26 ³² See, e.g., Perry Decl. ¶ 22; Hidalgo Decl. ¶¶ 17-20.

27 ³³ See Gee Decl. ¶ 10.

28 ³⁴ *Id.*

³⁵ *Id.*

³⁶ See *id.*; Hidalgo Decl. ¶ 12.

³⁷ *Id.* ¶ 13.

1 symptoms,”³⁸ so that treatment plans can be developed for them. This screening
 2 process is essential because “[t]he longer [appropriate] interventions are delayed, the
 3 greater the negative cumulative effect the acute neurophysiological, neuroendocrine,
 4 and neuropsychological response will have on these children and their parents.”³⁹ For
 5 these screenings to be effective given the special trauma inflicted upon the families,
 6 they must be conducted according to trauma-informed procedures and by
 7 appropriately trained trauma-informed professionals.⁴⁰ Such screenings must also be
 8 repeated following family reunification to determine whether the process of
 9 reunification revealed trauma not previously evident.

10 Third, mental-health services must be offered to those requiring them in an
 11 **environment that does not continue or prolong the trauma.** Treatment for trauma
 12 requires the restoration of a sense of safety and it is much easier to achieve this goal
 13 when the person receiving the service is in an environment of *actual safety*.⁴¹ When
 14 an individual must remain vigilant for threats and is preoccupied with uncertain and
 15 unknown possible outcomes they are less likely to, or are much slower to, develop a
 16 trusting alliance and an emotionally resonant connection with a therapist.⁴² The
 17 detention centers in which Plaintiffs, class members, and their children were or are
 18 held are not suitable locations to provide such therapy: “[f]or a child and an adult to
 19 remain in a setting he/she associates with the traumatic separation (even after
 20 reunification with the mother or father) . . . will cause additional and profound
 21 anticipation of further traumatic events[.] The mother and father who also experienced
 22 traumatic separation from their child would need to be placed in a safe family setting
 23 with their child(ren) to avoid an increase in such trauma symptoms as persistent
 24 negative thoughts and expectations about oneself, one’s world, and others.”⁴³

25 ³⁸ Declaration of Marti T. Loring, Dkt. No. 1-1 (“Loring Decl.”) ¶ 11; Hidalgo Decl.
 26 ¶¶ 17-20.

26 ³⁹ Perry Decl. ¶ 22.

27 ⁴⁰ See Gee Decl. ¶ 18.

27 ⁴¹ Berrick Decl. ¶ 27.

28 ⁴² *Id.*

⁴³ Loring Decl. ¶ 10.

Fourth, counseling services must be **provided to the family as a whole**, meaning that “the adult caregivers must be a part of the trauma intervention provided to these children.”⁴⁴ This approach is necessary not only to assist the child in “reestablishing [his or her] ability to effectively regulate himself [or herself],” but also “to treat [the parent’s] own primary trauma and to effectively support their traumatized child.”⁴⁵ Indeed, “[d]ecades of research demonstrates that the most significant protective factor for vulnerable children facing adversity are bonds to those that love them.”⁴⁶

Fifth, these services must “be delivered in a **culturally competent manner and linguistically sensitive manner and by mental health clinicians trained in evidence-based trauma-informed interventions.**”⁴⁷ The trauma caused by family separation is acute, and the migrant families are diverse. For the trauma to be appropriately mitigated, the mental-health services must be tailored to address the specific individuals harmed and their symptoms.

Sixth, mental-health services must be provided for **a sufficient period of time** in order to effectively mitigate the harm the government has caused, including after the families’ ultimate release from detention.

F. Mental Health Care Services Provided by the Government Are Not Effective Or Sufficient.

The mental health services actually offered by the government in detention facilities are sporadic to nonexistent. Family detention centers operated by the Office of Refugee Resettlement (“ORR”) do not routinely provide mental health services at all.⁴⁸ As to centers where minors reside, ORR provides general case management personnel and mental health follow-up services, but does not provide trauma-informed mental health care services for minors at such centers.⁴⁹ In fact, some “clinicians” at

⁴⁴ Perry Decl. ¶ 23.

⁴⁵ *Id.* ¶¶ 23-24; *see also* Hidalgo Decl. ¶ 25.

⁴⁶ Hidalgo Decl. ¶ 31.

⁴⁷ Gee Decl. ¶ 18 (emphasis added).

⁴⁸ Declaration of Alfonso Mercado, Dkt. No. 1-20 (“Mercado Decl.”) ¶ 4.

⁴⁹ *Id.*

1 such centers are *not* licensed mental health professionals.⁵⁰ None of the Plaintiffs
2 have been offered any mental health care screenings or services by the government.

3 Facilities with a law-enforcement purpose do not provide the conditions needed
4 for trauma-informed therapy to be effective. Far from providing an environment that
5 makes patients feel safe and reduces their toxic stress levels, conditions in law-
6 enforcement detention facilities “are highly stressful and do not provide children with
7 sufficient opportunities for positive, social-emotional supports.”⁵¹ Just as importantly,
8 because Plaintiffs, class members, and their children experienced trauma while in
9 detention at the hands of those in control of the detention environment, “children and
10 parents would not be likely to feel safe in such facilities and are likely to be re-
11 traumatized by the conditions.”⁵²

12 **LEGAL STANDARD**

13 Plaintiffs are entitled to preliminary injunctive relief if they show: (1) likely
14 success on the merits; (2) likely irreparable harm absent preliminary relief; (3) the
15 balance of equities tips in their favor; and (4) an injunction is in the public’s interest.
16 *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105–06 (9th Cir. 2012); *Sierra Forest Legacy v.*
17 *Rey*, 577 F.3d 1015, 1021-23 (9th Cir. 2009). Plaintiffs seeking a mandatory
18 injunction must show that the law and facts clearly favor their position. *See Garcia v.*
19 *Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). Under the Ninth Circuit’s
20 “sliding scale” approach, a stronger showing of one element may offset a weaker
21 showing of another, as long as plaintiffs “establish that irreparable harm is likely.” *All.*
22 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). “While
23 Plaintiffs carry the burden of demonstrating likelihood of success, they are not
24 required to prove their case in full at the preliminary injunction stage but only such
25 portions that enable them to obtain the injunctive relief they seek.” *Ms. L. Case*, Dkt.
26 No. 83 at 11, (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

27 ⁵⁰ *Id.*

28 ⁵¹ Hidalgo Decl. ¶ 24.

⁵² *Id.*

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs and the Class are likely to prevail on their substantive due process claim under the Fifth Amendment and obtain an order directing the government to provide them with effective mental health screening and treatment on two separate and independent grounds. First, the government is required to provide effective mental health care services to all persons it detains, both during detention and for a reasonable period thereafter. *See Wakefield v. Thompson*, 177 F.3d 1160, 1164-65 (9th Cir. 1999). To date, it has provided no such services to Plaintiffs and class members, in violation of its clearly established constitutional obligations.

Second, the government's separation of Plaintiffs and class members from their children, which has already been found likely to violate due process and shock the conscience, directly and foreseeably injured Plaintiffs and class members, and the government is obligated to remedy the injuries and risk of future injuries that its violations caused. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006) ("this circuit has held state officials liable . . . for their roles in creating or exposing individuals to danger they otherwise would not have faced.")

A. The Government's Detention of Class Members Created a Special Relationship Requiring It to Provide Effective Mental Health Treatment During and Following Detention.

Detained persons have a due process right requiring the government to provide adequate medical care. *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012); *see also Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)). The reason for this right is clear: while the government restricts a person's ability to provide for his or her own medical care, it must bear the responsibility of providing it. *See Wakefield*, 177 F.3d at 1164.

The government held or is holding Plaintiffs and class members in detention. Accordingly, it is required to provide adequate medical care including mental health services. *DeShaney*, 489 U.S. at 199–200; *see also, e.g., Doe v. Kelly*, 878 F.3d 710,

722–23 (9th Cir. 2017) (“There is no question that detainees are entitled to ‘adequate medical care’” as a component of their due process rights); *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc) (“With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes: ‘persons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their serious medical needs.’ This duty to provide medical care encompasses detainees’ psychiatric needs.”) (citation omitted). “In order to comply with their duty not to engage in acts evidencing deliberate indifference to inmates’ medical and psychiatric needs, jails must provide medical staff who are ‘competent to deal with prisoners’ problems.’” *Gibson*, 290 F.3d at 1187 (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982)).

Here, Plaintiffs and class members have suffered serious psychological trauma as a result of the government’s conduct, and as such they need immediate psychological screening and appropriate mental health care by appropriately-trained therapists to prevent further trauma and injury. *See supra* at 5-11. To be effective, such care must be provided to reunited families in an environment that does not continue or prolong the trauma. *See supra* at 11-12. Especially while class members remain in the government’s custody, effective care must be provided by the government.

Moreover, the government’s obligation to continue to provide effective, trauma-focused mental health care to Plaintiffs and class members remains in force for a period following their release. The Ninth Circuit has recognized that as “a matter of common sense,” a prisoner’s ability to secure medication is “not necessarily restored the instant he walks through the prison gates and into the civilian world.” *Wakefield*, 177 F.3d at 1164. Instead, the court found that “it may take a number of days, or possibly even weeks, for a recently released prisoner to find a doctor, schedule an examination, obtain a diagnosis, and have a prescription filled.” Accordingly, the

1 Ninth Circuit held that to comply with its due process obligations, a government
 2 releasing a prisoner “who is receiving and continues to require medication” must
 3 provide the prisoner “with a supply sufficient to ensure that he has that medication
 4 available during the period of time reasonably necessary to permit him to consult a
 5 doctor and obtain a new supply.” *Id.*; see also *Cook v. California*, No. 1:16-CV-
 6 00674-LJO-SAB, 2016 WL 4161114, at *5 (E.D. Cal. Aug. 5, 2016) (a three-month
 7 period following confinement could plausibly fall within the transitional period
 8 outlined in *Wakefield*).

9 Similarly here, the government’s responsibility to provide effective
 10 psychological care extends beyond the period of confinement. Many Plaintiffs and
 11 class members will be unable to immediately obtain effective mental health care upon
 12 release from detention. As many Plaintiffs and class members have never lived in the
 13 United States, they are unlikely to know how to navigate the process of identifying an
 14 appropriate mental health care provider. These difficulties are compounded by the
 15 fact that certain Plaintiffs and many class members do not speak English or Spanish,
 16 but instead speak languages that are not widely spoken in the United States. Thus, the
 17 length of time the government’s obligation to provide effective mental health care will
 18 continue after the release of Plaintiffs and class members in this case is not yet known,
 19 but what is clear is that Plaintiffs have a right to trauma-appropriate mental health care
 20 for a reasonable period after their confinement has ended.

21 **B. The Government Must Provide Effective Mental Health Care to**
 22 **Plaintiffs and Class Members to Remedy the Injury That It Caused.**

23 The government is responsible for remedying the injuries that it caused to
 24 Plaintiffs and class members under the “state-created danger” doctrine. That doctrine
 25 applies where “the state action ‘affirmatively place[s] the plaintiff in a position of
 26 danger,’ that is, where state action creates or exposes an individual to a danger which
 27 he or she would not have otherwise faced.” *Kennedy*, 439 F.3d at 1061 (quoting
 28

1 *DeShaney*, 489 U.S. at 197).⁵³ The Ninth Circuit has adopted a three-part test to
 2 determine whether this doctrine applies: “(1) whether any affirmative actions of the
 3 official placed the individual in danger he otherwise would not have faced; (2)
 4 whether the danger was known or obvious; (3) whether the officer acted with
 5 deliberate indifference to that danger.” *Henry A.*, 678 F.3d at 1002. In this case,
 6 Plaintiffs will succeed in demonstrating that each of these prongs is met.

7 **The Government Put Plaintiffs and Class Members in Danger.** The
 8 government’s actions satisfy the first prong of the *Henry A.* test because it
 9 affirmatively decided to separate Plaintiffs and class members from their children,
 10 directly inflicting trauma and injury on Plaintiffs and class members and exposing
 11 them to additional risk of future serious health problems that they would not face but
 12 for the government’s actions, including PTSD, anxiety, depression, suicidal ideation,
 13 loss of appetite, and loss of sleep. *See supra* at 5-10.

14 Neither Plaintiffs, class members, nor their children would have experienced
 15 this trauma, or the consequential risk of lifelong physical and mental illness, but for
 16 the government’s decision to separate Plaintiffs and class members from their
 17 children. The government gratuitously exacerbated that injury by effecting that
 18 separation suddenly, using force, and without providing information about loved ones’
 19 well-being or whereabouts, and with little or no communication between separated
 20 family members. These deliberate actions by the government have injured Plaintiffs
 21 and class members, and the government is responsible for remedying that injury.

22 Notably, the government’s actions that injured Plaintiffs and class members

23 ⁵³ The state-created danger doctrine is not limited to circumstances in which the
 24 government bears *sole* responsibility for a particular risk – it applies in instances
 25 where a government official exposes an individual to *additional* risk. *Penilla v. City of*
 26 *Huntington Park*, 115 F.3d 707 (9th Cir. 1997) (*per curiam*) (doctrine applicable
 27 against police officers who, after finding a man in need of medical care, cancelled a
 28 request for paramedics and locked him inside his house); *see also Estate of Gonzales*
v. Hickman, No. ED CV 05-00660 MMM (RCx), 2006 WL 4959780, at *13 (C.D.
 Cal. Jan. 30, 2006) (“The name of the doctrine . . . is something of a misnomer.
 Liability is not restricted to situations where the state actors *create* a danger; rather
 state actors who act affirmatively to *increase* an existing risk of danger”) (citations omitted).

1 have already been found likely to violate substantive due process. The Ninth Circuit
 2 has held that executive action violates substantive due process when it “shocks the
 3 conscience.” *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008); *see generally*
 4 *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (collecting cases). That
 5 standard is “not subject to a rigid list of established elements.” *Ms. L. Case*, Dkt. No.
 6 83 at 12 (citing *Lewis*, 523 U.S. at 850). Instead, “an investigation into substantive
 7 due process involves an appraisal of the circumstances rather than a formalistic
 8 examination of fixed elements.” *Id.* (citation omitted).

9 Here, it is abundantly clear that the government’s gratuitous and unnecessary
 10 separation of children from their parents meets this standard. As Judge Sabraw
 11 recently found in the *Ms. L. Case*, the totality of the government’s conduct is likely to
 12 be found to “shock[] the conscience,” including the government’s separation of
 13 children from their parents without an individualized determination that the parents
 14 were unfit or presented a danger to their children (*Ms. L. Case*, Dkt. No. 83 at 12-13,
 15 17); its separation of parents who presented themselves at a point of entry and thus
 16 committed no crime from their children (*id.* at 13); and its implementation of the
 17 family separation policy “without any effective system or procedure for (1) tracking
 18 the children after they were separated from their parents, (2) enabling communication
 19 between the parents and their children after separation, and (3) reuniting the parents
 20 and children after the parents are returned to immigration custody following
 21 completion of their criminal sentence” (*id.* at 14).

22 Here, the government’s conduct vis-à-vis Plaintiffs and class members is the
 23 same conduct found likely by Judge Sabraw to “shock the conscience” and thus
 24 violate due process. This Court should accordingly find that Plaintiffs and class
 25 members are likely to prevail in showing that the government violated their
 26 substantive due process rights and that that violation injured them.

27 **The Government Knew That Separating Children From Parents Would**
 28 **Cause Injury.** As to the second prong of the *Henry A.* test, the danger that forced

1 separation of children from their parents would cause psychological and physical
 2 harm was known and obvious to Defendants. As set forth in the prior section, the
 3 danger of family separation is well-understood in the medical and psychological
 4 communities. In fact, in a recent report, the government stated that “[s]tudies have
 5 found that both private and government-run residential institutions for children, or
 6 places such as orphanages and psychiatric wards that do not offer a family-based
 7 setting, cannot replicate the emotional companionship and attention found in family
 8 environments that are prerequisites to healthy cognitive development.”⁵⁴

9 Courts themselves have frequently recognized that separating children from
 10 their parents is harmful to both. *See, e.g., Leiva-Perez v. Holder*, 640 F.3d 962, 969-
 11 70 (9th Cir. 2011) (“separation from family members” identified as a factor in
 12 irreparable harm analysis); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir.
 13 1982) (“Family life, in particular the right of family members to live together, is part
 14 of the fundamental right of privacy” and noting that “[a] fundamental right is even
 15 more clearly involved” when it involves the right of children to live with their
 16 parents.”).

17 The facts of this case establish that Defendants were aware of the harm that
 18 would be caused to Plaintiffs, class members, and their children by ripping apart
 19 families and failing to reunify them. Ms. P.’s daughter fainted in terror when she
 20 realized she was about to be separated from her mother. Compl. ¶ 19. After nearly
 21 two months of separation from her mother, she feels depressed, hopeless, confused,
 22 and cannot speak about her mother or the experience of separation without crying,
 23 something witnessed by a counselor in her facility. *Id.* ¶ 21. Plaintiff Ms. O’s and Ms.
 24 M’s daughters have suffered excessive worry, dysphoric mood, crying spells, sleep
 25 and appetite disturbances, and fear of the unknown. *Id.* ¶ 145.

26 **The Government Inflicted Injury With Deliberate Indifference.** To satisfy

27 ⁵⁴ *Child Institutionalization and Human Trafficking*, U.S. DEP’T OF STATE (June 28,
 28 2018), <https://www.state.gov/documents/organization/283784.pdf> (last visited July 12,
 2018)

1 the third *Henry A.* factor, “[t]he state actor must ‘recognize[] [an] unreasonable risk
 2 and actually intend[] to expose the plaintiff to such risks without regard to the
 3 consequences to the plaintiff.’” *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir.
 4 2011). In evaluating whether a government official acted with deliberate indifference
 5 in the context of a due process claim, the Ninth Circuit recently held that “the proper
 6 standard of review for such claims is one of objective indifference, not subjective
 7 indifference.” *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120–24 (9th Cir. 2018).
 8 That is, a plaintiff must show that the government official took a harmful action
 9 notwithstanding that “a reasonable official in the circumstances would have
 10 appreciated the high degree of risk involved—making the consequences of the
 11 defendant’s conduct obvious.” *Id.* at 1125.

12 Here, reasonable officials in the Defendants’ positions would have appreciated
 13 the high risk that ripping the Plaintiffs and class members from their small children
 14 would inflict psychological trauma and consequent harm. As set forth above, experts,
 15 courts, and the government all have recognized that separating children from their
 16 parents inflicts trauma and imposes a high degree of risk that the separated family
 17 members will suffer psychological and physiological consequences for years to come.
 18 *See supra* at 5-10. Even if reasonable officials could somehow fail to anticipate what
 19 every human being would intuit, viz., that tearing families apart would impose a high
 20 risk of trauma, the heart-rending reactions of separated families (including at least one
 21 suicide) would put those officials on immediate notice of the harm they were
 22 inflicting. In addition, there are a number of measures available that the government
 23 could have taken to avoid the harm caused here. For example, the government could
 24 have kept families together by using community-based case management, such as the
 25 arbitrarily terminated Family Case Management Program. Compl. ¶¶ 7, 76-78.
 26 Particularly in light of these alternatives, a reasonable government official would have
 27 appreciated that tearing families apart imposed a high risk of harm. Due Process
 28 requires the government to remedy its wanton violation.

1 **C. The Government Has Failed To Provide Adequate Mental Health**
 2 **Screenings and Treatment.**

3 The government has completely failed to provide effective, trauma-focused
 4 mental health care screenings and treatment to Plaintiffs and class members, which is
 5 a further violation of their constitutional rights.

6 The government has not staffed the detention facilities with therapists trained in
 7 recovery from traumatic experiences,⁵⁵ and has not offered any family-based, trauma-
 8 informed treatment. In fact, some “clinicians” who purportedly provide mental health
 9 services at centers where minors reside are *not* licensed mental health professionals.⁵⁶
 10 Even as to children separated from their parents, who are at the greatest risk of
 11 suffering lifelong mental and physical harm as a result of the stress inflicted on them,
 12 the government does not provide specialized trauma-informed mental health care
 13 services, and does not routinely provide *any* mental health services at family detention
 14 centers operated by the Office of Refugee Resettlement.⁵⁷ The government has thus
 15 fallen far short of the constitutional standard of providing “medical staff who are
 16 competent to deal with prisoners’ problems.” *Gibson*, 290 F.3d at 1187. The
 17 government has also wholly abdicated its constitutional responsibilities to Plaintiffs
 18 and class members who have been released from detention by providing absolutely no
 19 mental health care screenings or services to any class members following their release.
 20 The government’s failure to provide these mental health services constitutes a second
 21 Constitutional violation.

22 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE**
 23 **INJUNCTION IS NOT GRANTED.**

24 The government needlessly and gratuitously traumatized vulnerable families
 25 seeking asylum by separating them in violation of their constitutional rights. The
 26 government compounded that trauma and constitutional violation by failing to provide
 27 Plaintiffs and class members the trauma-focused therapy that is their constitutional

28 ⁵⁵ Mercado Decl. ¶ 4.

⁵⁶ *Id.*

⁵⁷ *Id.*

1 due as detainees and as persons injured by the government's violations of their rights.
2 The government's failure to provide effective therapy itself violates the constitutional
3 rights of Plaintiffs and class members, and thus constitutes irreparable harm. Worse,
4 however, the government's failure to provide such treatment risks subjecting Plaintiffs
5 and class members to a lifetime of psychological and physical problems, intangible
6 injuries that cannot be remedied by monetary damages alone.

7 "It is well established that the deprivation of constitutional rights
8 unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976,
9 994 (9th Cir. 2017) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.
10 2012)). As set forth above at 14-20, the government's ongoing failure to provide
11 effective, trauma-focused therapy to Plaintiffs and class members violates its
12 constitutional obligations to them, both as persons who were or are detained by the
13 government, and as persons injured by the government's unconstitutional policy of
14 separating parents from their children. This violation alone constitutes irreparable
15 injury.

16 Without the injunctive relief sought by this motion, Plaintiffs and class
17 members also are likely to suffer lifelong intangible injuries, which also constitute
18 irreparable harm. In *Arizona Dream Act Coalition v. Brewer*, the Ninth Circuit
19 explained that "[i]rreparable harm is traditionally defined as harm for which there is
20 no adequate legal remedy, such as an award of damages." 757 F.3d 1053, 1068 (9th
21 Cir. 2014). In that case, which challenged Arizona's policy of refusing to issue
22 driver's licenses to beneficiaries of the Deferred Action for Childhood Arrivals
23 program, the Ninth Circuit held that Arizona's policy caused the plaintiffs to suffer
24 irreparable harm because the plaintiffs' inability to obtain driver's licenses "limit[ed]
25 their professional opportunities" and "diminished their opportunity to pursue their
26 chosen professions." *Id.* It found that "[t]he irreparable nature of Plaintiffs' injury is
27 heightened by Plaintiffs' young age and fragile socioeconomic position. Setbacks
28 early in their careers are likely to haunt Plaintiffs for the rest of their lives." *Id.* It

1 noted that “[n]o award of damages can compensate Plaintiffs[] for the myriad personal
2 and professional harms caused by their inability to obtain driver’s licenses. Thus,
3 Plaintiffs are likely to suffer irreparable harm in the absence of an injunction.” *Id.*

4 Here, the harm caused by the government’s failure to provide effective mental
5 health care and screenings to Plaintiffs and class members are more profound than the
6 harm in *Arizona Dream Act Coalition*. Absent such therapy, Plaintiffs and class
7 members risk a lifetime of mental health conditions including PTSD, depression, and
8 anxiety, which have consequences including an increased risk of suicide and
9 professional and social difficulties. *See supra* at 5-10. All of these conditions, if
10 realized, will diminish Plaintiffs’ and class members’ professional opportunities and
11 life prospects in myriad ways. Accordingly, the government’s failure to provide the
12 constitutionally-required screenings and treatment constitutes irreparable harm under
13 the standard set forth in *Arizona Dream Act Coalition*. This is precisely the type of
14 harm that warrants the injunctive relief requested here. *See Hernandez*, 872 F.3d at
15 999 (noting that injunction is appropriate where maintenance of “the status quo . . . is
16 exactly what will inflict the irreparable injury”) (citation omitted).

17 **III. THE BALANCE OF HARDSHIPS FAVORS THE INJUNCTION.**

18 The government needlessly traumatized Plaintiffs by forcibly separating them
19 from their children and continuing to keep them apart. Beginning to appropriately
20 treat that trauma is in the public interest and outweighs any purported injury the
21 government may assert. As explained above (at 14-20), the Due Process Clause
22 requires that Plaintiffs be provided with trauma-focused mental health services. These
23 mental health services are plainly in the interests of Plaintiffs and class members, as
24 they are the sole means by which the harm inflicted by the government might be
25 mitigated.

26 On the other hand, ordering the government to provide treatment does no harm
27 because it simply requires the government to live up to its constitutional and legal
28 obligations. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citing

1 *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (“[T]he INS cannot reasonably
 2 assert that it is harmed in any legally cognizable sense by being enjoined from
 3 constitutional violations.”)); *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986)
 4 (where an injunction seeks to require defendants to comply with existing law, the
 5 injunction imposes no burden but “merely seeks to prevent the defendants from
 6 shirking their responsibilities”).⁵⁸ The balance of hardships favors the injunction.

7 **IV. THE PUBLIC INTEREST FAVORS THE INJUNCTION.**

8 The requested injunction serves the interest of the general public by ensuring
 9 that the government complies with its constitutional obligations. This alone is
 10 sufficient to justify entry of the requested injunction. *See Hernandez*, 872 F.3d at 996
 11 (“public interest concerns are implicated when a constitutional right has been violated,
 12 because all citizens have a stake in upholding the Constitution.”). *Melendres*, 695 F.3d
 13 at 1002 (“[I]t is always in the public interest to prevent the violation of a party’s
 14 constitutional rights.” (internal quotation omitted)); *see also United States v. Raines*,
 15 362 U.S. 17, 27 (1960) (“[T]here is the highest public interest in the due observance of
 16 all the constitutional guarantees.”).

17 The injunction also serves the public interest by reducing “the indirect hardship
 18 to . . . friends and family members” of the Plaintiffs and class members. *Hernandez*,
 19 872 F.3d at 996. Without effective, trauma-focused screening and treatment, the
 20 psychological and physical health conditions that Plaintiffs and class members may
 21 suffer will place heavy burdens on their friends and family members, both as a result
 22 of the care to Plaintiffs and class members that friends and family members may be
 23 required to provide directly or pay for, and as a result of the diminution in the ability
 24 of Plaintiffs and class members to act as breadwinners and caretakers.

25
 26 ⁵⁸ In the event the government claims that providing appropriate mental health care
 27 creates a financial burden, the Ninth Circuit has repeatedly rejected such arguments.
 28 *See, e.g., Hernandez*, 872 F.3d at 996 (“Faced with such a conflict between financial
 concerns and preventable human suffering, we have little difficulty concluding that
 the balance of hardships tips decidedly in plaintiffs’ favor.” (internal quotation marks
 omitted)); *see also M.R. v. Dreyfus*, 697 F.3d 706, 737-38 (9th Cir. 2012).

1 Finally, allowing the suffering of Plaintiffs and class members to continue
 2 untreated is contrary to the public interest. *See Norsworthy v. Beard*, 87 F. Supp. 3d
 3 1164, 1194 (N.D. Cal. 2015) (“[t]here is no public interest in [Plaintiff]’s continued
 4 suffering during the pendency of this litigation”). The public interest favors the
 5 injunctive relief requested in this motion.

6 CONCLUSION

7 Plaintiffs and class members are entitled to mental health care screenings and
 8 effective family treatment to address and remediate the effects of the trauma that the
 9 government wantonly and knowingly inflicted on them under its unconstitutional
 10 policy of separating parents from their children. The government has wholly failed to
 11 provide such treatment, violating its constitutional obligations to care for persons it
 12 detains and on whom it has inflicted injury. The balance of harms and public interest
 13 favor requiring the government to live up to its obligations. The Court should enter an
 14 injunction requiring the government to provide meaningful access to:

- 15 • mental health screening for all Plaintiffs and class members to identify those
 16 who require further treatment as a result of the trauma inflicted on them, which
 17 must be performed by persons trained to recognize the signs and symptoms of
 18 such trauma, within fourteen (14) days of the entry of the Court’s injunction;
- 19 • subsequent mental health screening for all Plaintiffs and class members to
 20 identify those who require further treatment as a result of the trauma inflicted
 21 on them, which must be performed by persons trained to recognize the signs
 22 and symptoms of such trauma, within fourteen (14) days of the reunification of
 23 the Plaintiff or class member with his/her child(ren) if such reunification takes
 24 place after the screening ordered as referenced above;
- 25 • mental health care treatment, for those Plaintiffs and class members whose
 26 screenings indicate that such treatment is needed, which must:
 - 27 ○ be provided in a safe environment that will not reinforce trauma;
 - 28 ○ be provided on a family basis to all members of the reunified family together;
 - be provided in a culturally competent manner by mental health clinicians trained in evidence-based trauma-informed interventions; and
 - be provided for a period of time sufficient to treat the trauma inflicted; and
- such other relief as is permitted by law.

Dated: July 18, 2018

Respectfully Submitted,

MARK ROSENBAUM (SBN 59940)
mrosenbaum@publiccounsel.org

/s/ Amy P. Lally
Amy P. Lally (SBN 198555)
alally@sidley.com
Ellyce R. Cooper (SBN 204453)
ecooper@sidley.com
SIDLEY AUSTIN LLP

Judy London (SBN 149431)

1999 Avenue of the Stars, 17th Floor
Los Angeles, CA 90067
Telephone: +1 310 595-9662
Facsimile: +1 310 595-9501

jlondon@publiccounsel.org

Talia Inlender (SBN 253796)

tinlender@publiccounsel.org

Alisa Hartz (SBN 285141)

ahartz@publiccounsel.org

Lucero Chavez (SBN 273531)

lchavez@publiccounsel.org

Elizabeth Hadaway (SBN 308800)

ehadaway@publiccounsel.org

Malhar Shah (SBN 318588)

mshah@publiccounsel.org

Deena Tumeh (SBN 318573)

dtumeh@publiccounsel.org

PUBLIC COUNSEL

610 S. Ardmore Avenue

Los Angeles, CA 90005

Telephone: +1 213 385-2977

Facsimile: +1 213 385-9089

Carter G. Phillips*
cphillips@sidley.com
Jennifer J. Clark*
jennifer.clark@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: +1 202 736-8270
Facsimile: +1 202 736-8711

Michael Andolina*
mandolina@sidley.com
Timothy Payne*
tpayne@sidley.com
Kevin Fee*
kfee@sidley.com
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Telephone: +1 312 853-7000
Facsimile: +1 312 853-7036

Mark E. Haddad (SBN 205945)

markhadd@usc.edu

Part-time Lecturer in Law, USC Gould
School of Law**

University of Southern California

699 Exposition Blvd.

Los Angeles, CA 90089

Telephone: +1 213 675-5957

Sean A. Commons (SBN 217603)
scommons@sidley.com
Bridget S. Johnsen (SBN 210778)
bjohnsen@sidley.com
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
Telephone: +1 213 896-6000
Facsimile: +1 213 896-6600

Luis Cortes Romero (SBN 310852)

lcores@ia-lc.com

Alma L. David (SBN 257676)

adavid@ia-lc.com

Immigrant Advocacy & Litigation

Center, PLLC

19309 68th Ave South R-102

Kent, WA 98032

Telephone: +1 253 872-4730

Facsimile: +1 253 237-1591

*Application for admission pro hac vice to be submitted

** Institution listed for identification purposes only